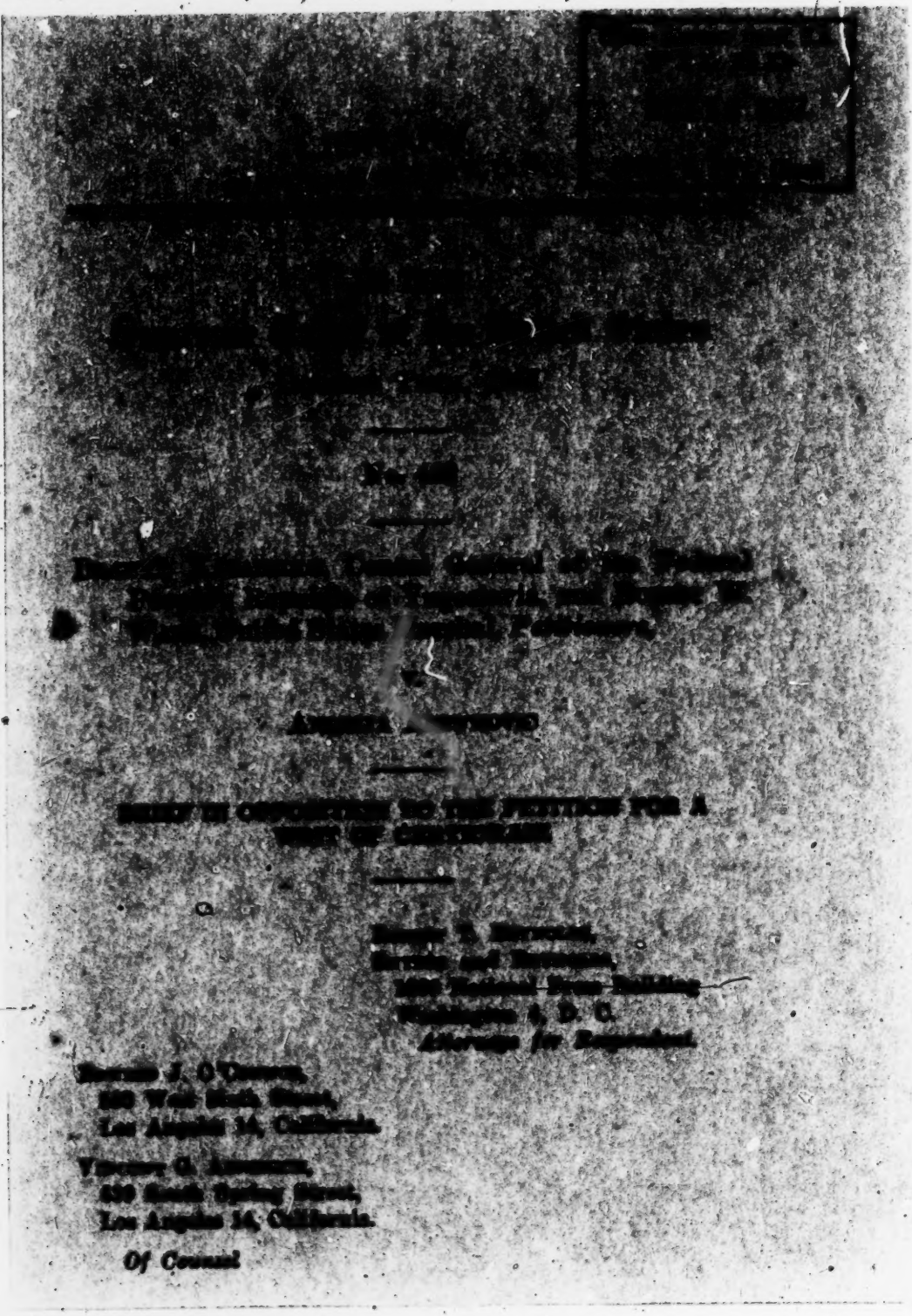


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 462

BRANKO KARADZOLE, Consul General of the Federal People's Republic of Yugoslavia, and ROBERT W. WARE, United States Marshal, *Petitioners*,

v.

ANDRIJA ARTUKOVIC

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This proceeding derives from an extradition complaint filed with the United States Commissioner at Los Angeles by the Consul General of Yugoslavia pursuant to which respondent was taken into custody from which he sought release and dismissal of said complaint by petitioning the United States District Court for the Southern District of California for a writ of habeas corpus. The grounds for seeking such writ were that the said Commissioner had no jurisdiction because the complaint was not based on a valid and existing treaty and, further, that the offenses charged in the said complaint were political in char-

acter and not extraditable under Article VI of such treaty if it was in effect.

The validity and continuing existence of an extradition treaty between the United States and Yugoslavia was affirmatively found in *Ivancevic* v. *Artukovic*, 211 F:2d 565, cert. denied 348 U.S. 818, rehearing denied 348 U.S. 889.

Thereafter the said District Court considered the further ground alleged in the petition for the writ and found that the offenses charged in the complaint were political offenses not extraditable under Article VI of the treaty; thus the said Commissioner was without jurisdiction to consider or examine under the complaint. Upon appeal, the United States Court of Appeals for the Ninth Circuit affirmed unanimously the decision of the said District Court. The appellants below now seek review in this Court by petition for a writ of certiorari.

The record before this Court reflects that the respondent was born in Austria-Hungary in territory later incorporated into the Kingdom of the Serbs, Croats and Slovenes created in 1919 (R. p. 175); that he never by any voluntary act embraced citizenship of Yugoslavia but always considered himself a Croatian (R. p. 179); that the German invasion of Yugoslavia commenced in April 1941, and at the same time the Croats revolted and proclaimed the Independent State of Croatia (R. 180); that Croatia was recognized by Germany, Japan, Finland, Sweden, Hungary, Bulgaria and Rumania (R. 181); that Croatia raised military forces which fought only upon its territory (R. 185); that respondent was a citizen and national of Croatia bearing diplomatic passport issued by such state in

November 1941 (R. 190); that he was successively appointed between April 1941 and May 1945 the Minister of Interior, Minister of Justice, again Minister of Interior, and President of the State Council of the Croat state (R. 181-3); that the offenses alleged to have been committed occurred in 1941-42 (R. 504); that respondent was Minister of Interior in the "Cabinet" of Ante Pavelic during 1941-42 (R. 503); that participation of respondent in the offenses charged is alleged to have occurred through orders given as Minister of Interior in 1941-42 when Yugoslavia was occupied by German and Italian troops (R. 503); that judicial notice was taken of the existence of war involving the Croat State at the time of alleged issuance of such orders by respondent (R. 539); that judicial notice was taken of the fact that the government of Yugoslavia fled the country at the time of the German invasion in 1941 (R. 539); that judicial notice was taken that various factions representing differing political beliefs were struggling for control of Croatia during this period (R. 561); finally the military forces of Soviet Russia and Tito's Partisans overran Croatia in May 1945 and respondent was forced to flee the country (R. 186-7).

It is further a matter of historical fact of which the courts may take notice that during the period 1941-42, and extending well into 1945, the military forces of six states and factions were engaged in strife upon the soil of Croatia and Yugoslavia; to-wit, those of Germany, Italy, Russia, Croatia, and Yugoslavia as represented by the guerilla forces of Mihailovich and Tito.

SUMMARY OF ARGUMENT

The Court below had jurisdiction, examined the offenses charged against respondent, and correctly found them to be "political offenses" upon a background of factual allegations contained within the complaint, indictment and its attachment, and historical facts of which judicial notice was taken.

The Court below gave due consideration to a construction of the "political offenses" articles of extradition treaties ascribed to the Executive Department of the Government and urged as creating an exception to otherwise non-extraditable political offenses, and found such alleged construction insufficient basis to disregard the plain admonition of such treaty articles that extradition shall not be granted for political offenses, and in such decision the Court below followed well-established principles of treaty construction laid down by this Court.

There is no clear and conclusive showing that the Executive Department ever held the treaty construction ascribed to it by petitioners, that the basis of United States actions in United Nations assembly from which such construction was drawn was, in fact, summary military surrender as contrasted with extradition under treaty; and further that if such construction was ever held by the Executive Department, it is of recent date, has not been consistently adhered to, and apparently is not now held.

REASONS FOR DENYING THE WRIT

I.

The Court Below in Considering the Construction of Article VI of This Treaty and Similar Articles of Other Treaties Attributed to the Executive Department, and in Concluding That, Whether or Not Such Attribution Was Properly Made, the Sought-for Construction Was Insufficient to Modify Long Standing Judicial Interpretations of Treaties, Ruled on a Question of Federal Law Long Settled by Decisions of This Court.

Just as in submitting their case to the Court below, the petitioners devote a lengthy portion of their petition to the recitation of resolutions proposed to, discussed, and acted upon by the United Nations in General Assembly in which the United States participated. It appears to be the theory of the petition that by reason of the resolutions offered, supported, opposed and otherwise acted upon by the United States delegation to the United Nations in 1946-47, the Executive Department of the United States must be found to have construed Article VI of this treaty and similar articles of other treaties as permitting the extradition of some persons accused of "political offenses" while prohibiting the extradition of others so charged. It is not quite clear by what standards "political offenses" are to be divided into extraditable and non-extraditable categories, as Article VI provides only for non-extradition, but the construction sought after by petitioners would make extraditable "political offenses" when designated by the demanding government as "war crimes."

Such theory was fully presented to the Court below which considered and discussed the same in its opinion (R. 561-3). Thus petitioners incorrectly urge this Court that the Court below held that "resolutions of international bodies, concurred in by the United States

and having pertinency to the construction and application" of treaty provisions "*are not to be considered* in construing and applying" a provision of a treaty to which the United States is a party (P. 20). What the Court below did was to consider the treaty construction drawn by petitioners from resolutions acted upon by the United Nations and to conclude that the offenses charged having been found "of a political character", there is no room within the plain language of Article VI permitting extradition for a "political offense". What petitioners seek in this Court, apparently, is a ruling that treaty construction ascribed to the Executive Department is binding upon the courts, since it is clear from the opinion of the Court below that after consideration of the alleged executive construction it was rejected as insufficient to modify long standing judicial constructions of treaty provisions.

Petitioners profess to find it "not clear" to what judicial interpretations the Court below had reference in its opinion, but it is fundamental that the construction of treaties is for the courts and, if necessary, to the exclusion of any other construction or interpretation. This is made quite clear by the language of this Court in *United States* v. *Rauscher*, 119 U.S. 407, 30 L.Ed. 425, 7 S.Ct. 234, an extradition case under a treaty between the United States and Great Britain, wherein the Court said, in part (p. 419):

> "The treaty of 1842 being, therefore, the supreme law of the land, of which the courts are bound to take judicial notice, * * *, we proceed to inquire, * * *, into the true construction of the treaty."

And in *Ex parte Charlton,* 185 F. 880 (C.C. D.N.J., 1911) affmd. 229 U.S. 447, 57 L.ed. 257, 33 S.Ct. 945, that Court held:

> "The construction of an extradition treaty, made by the Constitution a part of the supreme law of the land, is for the courts, and they are not bound by the construction placed thereon by the executive or diplomatic branches of the government or by the construction placed thereon by the foreign country with whom the treaty is made."

And in *Valentine* v. *U.S. ex rel. Neidecker,* 299 U.S. 5, 81 L.ed. 5, 57 S. Ct. 100, this Court said:

> "Historical background and administrative practice furnish us no warrant to reading into the treaty with France a grant which the parties failed to insert. * * *."

The jurisdiction of the courts to construe treaty provisions being well-founded and unchallenged, it appears appropriate to set forth for the ready reference of this Court those portions of Article VI of the instant treaty and of comparable articles of other extradition treaties which have been the subject of judicial and executive construction heretofore and to which the alleged construction of the Executive Department is presently sought to be applied.

In the treaty of 1861 with Mexico[1], it is agreed that—

> "The provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character, * * *."

---

[1] Malloy, Treaties, Conventions, Internat'l Acts, etc., Vol. I.

In the treaty of 1870 with Salvador,[2] it is stated that—

> "The provisions of this treaty shall not apply to any crime or offence of a political character, * * * ."

In the treaties of 1882 with Belgium[1], of 1887 with the Netherlands,[2] of 1903 with Guatemala,[1] and of 1906 with San Marino,[2] the pertinent article reads—

> "The provisions of this convention shall not be applicable to persons guilty of any political crime or offense or of one connected with such an offense."

The most frequently used language appears in the treaties of 1901 with Servia[2] (the controlling treaty herein), of 1889 with Great Britain[1], of 1893 with Sweden[2] and with Norway,[2] of 1900 with Bolivia[1] and Chile,[1] and of 1902 with Denmark,[1] among others, and reads—

> "A fugitive criminal shall not be surrendered if the offense in respect of which his surrender is demanded be of a political character, * * * ."

A second fundamental principle of construction adhered to by this court is that where the meaning of the treaty provision is clear and unambiguous, there is no need for interpretation and nothing will be added to the treaty provision. Thus, in interpreting a treaty with Spain this Court long ago said wisely and prudently in *The Amiable Isabella*, 19 U.S. 1, 5 L.ed. 191, 6 Wheat. 1, (1821):

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[1] Malloy, Treaties, Conventions, Internat'l Acts, etc., Vol. I.

[2] Malloy, Treaties, Conventions, Internat'l Acts, etc., Vol. II.

(at p. 70)

"* * * There is no room here left for interpretation, on account of ambiguous language of the parties. They have expressed themselves in the clearest manner, * * *

(at p. 71)

"In the first place, this court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power and not an exercise of judicial functions. It would be to make, and not to construe a treaty. * * * ."

Just as emphatically, and more recently, in interpreting an extradition treaty with France, this Court said in *Valentine* v. *U. S. ex rel. Neidecker, supra* (1936), Mr. Chief Justice Hughes speaking for the Court:

(at p. 11)

"* * * Examining the treaty in that aspect, it is our duty to interpret it according to its terms. These must be fairly construed, but we cannot add to or detract from them."

(at p. 13)

"Historical background and administrative practice furnish us no warrant to reading into the treaty with France a grant which the parties failed to insert. * * * ."

(at p. 18)

"However regrettable such a lack of authority may be, the remedy lies with the Congress, or with

> the treaty-making power wherever the parties are willing to provide for the surrender of citizens and not with the courts."

Language more applicable to the attempt of petitioners to have the courts read into the provisions of Article VI of the controlling treaty, and comparable articles of other extradition treaties, an exception which the parties thereto did not provide, can scarcely be found. As will be set forth more fully to this Court in a later discussion of treaty construction ascribed herein to the Executive Department (*infra*, pp. 20-21), the United States, in negotiating the very treaty before this Court, did apparently seek to insert into Article VI a specific exception to non-extraditable political offenses, but Servia (the Yugoslav party to this treaty) seemingly was unwilling to accept an exception to the non-extraditability of "political offenses".

Because the admonition in extradition treaties is so clear that extradition is prohibited where the offense charged is found to be of a political character, there has been little challenge of this principle in the courts of the United States and the constructions of this article of extradition treaties by the courts have usually been upon the questions whether the court had jurisdiction to determine whether the offense charged was "of a political character", and whether a precise definition of a "political offense" or an "offense of a political character" can be prudently made.

That the courts of the United States have found themselves possessed of jurisdiction to determine whether an offense is one of political character is well established by the opinions of the examining courts

in the cases of *In re Ezeta*, 62 F. 972 (ND. Cal., 1894), *In re Lincoln*, 228 F. 70 (E.D.N.Y. 1915) affmd. 241 U.S. 651, and of this Court in *Ornelas* v. *Ruiz*, 161 U.S. 502, 40 L.ed. 787, 16 S.Ct. 689 (1896), where, in reversing the District Court for substituting its judgment for that of the United States Commissioner upon the issue whether the offenses were political in nature, this Court unmistakably approved the exercise of "authority of decision" by the Commissioner in determining offenses were of a purely political character.

The court deciding *In re Ezeta*, supra, provided in its opinion (p. 997 ff.) a careful examination of various definitions of an offense of political character, any of which would cover the circumstances of the instant case.

Upon the question whether the magnitude or number of crimes charged in extradition provides an exception to non-extradition where the offenses are of political character, the court in *In re Ezeta*, supra, had this to say, which is particularly pertinent since several hangings, shootings and robberies were charged to the respondents therein (p. 997-8):

> "* * * My duty will have been performed when I shall have determined the character of the crimes or offenses charged against these defendants. During its progress, crimes may have been committed by the contending forces of the most atrocious and inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority, in this examination, to determine what acts are within the rules of civilized warfare, and what are not. War, at best is barbarous, and hence it is said that "the law is silent during war."

Perhaps the most serious challenge to the treaty provision that extradition is prohibited for offenses or crimes having a political character arose out of the differing executive constructions given by the governments of the United States and Mexico to Article VI of the extradition treaty of 1861 between those countries, reading in part—

> **"The provisions of the present treaty shall not be applied in any manner to any crime or offence of a purely political character. * * * "**

The case, which provided the forum for the differing executive constructions of the above provision was *Ornelas* v. *Ruiz*, *supra*, and an exceptionally illuminating, but lengthy, discussion and summary of executive action following this Court's decision therein is to be found in Moore's International Law Digest, Vol. IV, pp. 336-351. Briefly, after this Court's decision in 1896 the Mexican Government asked for the surrender of the three respondents in that case—Ruiz, Duque and Guerra. As the latter had temporarily escaped, only the first two could be surrendered, and they were. Upon the recapture of Guerra, the Mexican Government asked in 1897 for his surrender. But the then United States Secretary of State (Mr. Sherman) refused, holding the evidence showed the expedition of which Guerra was a member to have been revolutionary in origin and purpose, and thus his offense was of a political character. The Mexican Government protested this construction, arguing that the word "purely" in the treaty provision quoted above permitted a breakdown of "political offenses" into extraditable and non-extraditable categories, and pointing to the non-appearance of this word "purely"

in other treaties to which the United States is a party (it is lacking in the treaty before this Court). The Executive Department of the United States finally rejected the Mexican protest, and perhaps the following excerpt from the language of President McKinley, in his annual message, Dec. 5, 1898, For. Rel. 1898, quoted in Moore's International Law Digest, Vol. IV, pp. 349-50, best expresses the executive construction of such treaty provision:

> "'The interpretation of certain provisions of the extradition convention of December 11, 1861, has been at various times the occasion of controversy with the Government of Mexico. An acute difference arose in the case of the Mexican demand for the delivery of Jesus Guerra, who, having led a marrauding expedition near the border with the proclaimed purpose of initiating an insurrection against President Diaz, escaped into Texas. Extradition was refused on the ground that the alleged offense was political in its character and therefore came within the treaty proviso of nonsurrender. The Mexican contention was that the exception only related to purely political offenses, and that as Guerra's acts were admixed with the common crimes of murder, arson, kidnapping and robbery the option of nondelivery became void, a position which this Government was unable to admit in view of the received international doctrine and practice in the matter.'"

This long-standing executive construction of the nonextraditable provision of that treaty is squarely in point with the instant case, as the theory of the petition herein is that the "political character" of the offenses charged is wiped out by the allegation that such offenses also constitute "war crimes". In other

words, petitioners urge that the admixture of "political offenses" and "war crimes" results in an extraditable offense though no exception to non-extradition for "political offenses" is provided in the treaty. It should be noted that despite the use of the word, "purely", in the treaty with Mexico, political offenses admixed with crimes like murder, arson, kidnapping and robbery were held non-extraditable, whereas in the language of Article VI of the treaty before this Court the word, "purely", is not present. The non-extraditable character of political offenses and exceptions proposed thereto in treaty negotiation by the United States will be treated later in this brief in discussion of the actuality and consistency of treaty construction ascribed to the Executive Department by petitioners.

It is submitted that the foregoing judicial and executive precedents amply illustrate the "long standing judicial interpretations" referred to by the Court below in its conclusion that the alleged executive construction of "political offense" articles of extradition treaties extracted by petitioners from various United Nations resolutions and actions, even if correct, had not sufficient force of law to modify such long standing judicial interpretations.

II.

The Construction of Extradition Treaty Provisions Ascribed to the Executive Department Is Erected by Petitioners Upon Circumstances Not Within the Operation of Extradition Treaties; and if Such Construction Was Held by the Executive Department in 1946-47, It Was Not so Held at the Time of Negotiating the Instant Treaty and There Is No Evidence That It Is Presently Held, and Thus It Is Not a Consistent Interpretation or Construction to Which the Courts Need Give Much Weight.

Contrasted to the unambiguous language of extradition treaties providing for the surrender of persons charged with crimes detailed specifically in the treaties, and providing that extradition shall not occur when the offense is of a political character, the resolutions, debate and actions of the United Nations in General Assembly will be scanned vainly for unambiguous language stating that such resolutions and actions are intended to construe the provisions of treaties to which the United States became a party in many cases more than fifty years ago.

Petitioners point out that the United States representative was present and participated in the discussions concerning the extradition and or surrender of "war criminals", and make much of the fact that in such participation he did not indicate that only summary military action and not extradition of war criminals was involved, or that "war criminals" might be considered "political offenders" under treaties to which the United States is a party (P. 29). Quite helpfully, petitioners provide this Court with excerpts from the discussion of the United States delegate, and the following quotation therefrom appears (P. 33):

> "We have surrendered to Yugoslavia, Poland, Czechoslovakia, the Soviet Union, Belgium, and

> the United Kingdom, in the aggregate, many hundreds of persons desired by them for trial. * * *"

As this statement was made in rebuttal of a charge by Yugoslavia that the United States, among others, had failed "to carry out their obligations with respect to war criminals and quislings" (P. 32), there can be no doubt that the surrender of "many hundreds of persons desired by them for trial" referred to "war criminals and quislings."

Now if "many hundreds of persons" were surrendered in accordance with extradition treaties to which the United States is, or was, a party, the court records of the United States would be filled with examples of the application of treaty provisions under the construction insisted upon by petitioners. But respondent has not been able to locate a single record in the United States courts of the extradition or surrender under treaty of one "war criminal" or "quisling" of the "many hundreds of persons" so surrendered. Why not? Because so far as can be determined all of those "hundreds of persons" were "surrendered" summarily by our military forces and commanders in the occupation zones of Germany and Austria. No wonder the United States delegate did not mention that summary military action was involved in such "surrender"; it was a fact well known to all of those before whom he spoke. No wonder also he did not mention that "war criminals" might be considered "political offenders" under our treaties, for in summary military surrender of prisoners or others within military jurisdiction there is no need even to show the existence of an extradition treaty.

much less its provisions. This Court may be certain that had the extradition of one of the "hundreds" of "war criminals" or "quislings" been accomplished in accord with extradition treaties and statutes of the United States, thus bearing out the construction of Article VI and comparable articles of other treaties attributed by petitioners to the Executive Department of the United States Government, the petition herein would have contained numerous references thereto, instead of setting forth a fanciful theory of executive construction of treaty provisions based upon assumptions, inferences, deductions, underlying premises, etc., drawn from resolutions before the United Nations in General Assembly.

As the actual surrender of persons charged with "war crimes" was carried out by summary military action without apparent regard to treaties, it was totally unnecessary that the United States delegate attempt to interpret extradition treaties of the United States in relation thereto.

Further showing the inapplicability of "war crimes" under extradition treaties of the United States is the partial definition of "war crimes" provided at the foot of page 10 of the Petition. Among the offenses defined as "war crimes" are murder, extermination, enslavement, deportation, persecution on political, religious or racial grounds, whether or not in violation of the domestic law of the country where perpetrated. The extradition treaty before this Court, and others involving the United States, specify a dozen or more crimes for which "extradition shall be granted". But "deportation" and "persecution" are not found among such specified crimes, and the

instant treaty would not permit extradition by Yugoslavia for "enslavement". As petitioners assume that the United States delegate to the United Nations was well aware that "political offenses" are not extraditable under treaty, it would not be too much to assume that such delegate was aware that only crimes specified in the treaty are extraditable. As "hundreds of persons" were surrendered as "war criminals," it cannot be doubted that among them were those charged with the "war crimes" of deportation, persecution or enslavement, not extraditable under our extradition treaties. How, then, can it be possibly assumed that the United States delegate had in mind, in discussing the surrender of "war criminals" for crimes not even specified in extradition treaties, that his actions would some day be interpreted as construing the provisions of such treaties?

Such definition of "war crimes" provides also that the act charged need not be in violation of the domestic law of the country where perpetrated. As this is so palpably inconsistent with the basic principles of extradition treaty negotiations, there is little need to repeat that in view of the wide differences between surrender of "war criminals" and extradition under treaty the United States delegate could scarcely have dreamed that his actions would be one day viewed as construing extradition treaty provisions.

The petitioners admit that the construction of extradition treaty provisions herein ascribed to the Executive Department "has not been of long duration." (P. 38). But they rely upon *Sullivan* v. *Kidd*, 254 U.S. 433, 65 L. ed. 344, 41 S. Ct. 158, as providing the rule that executive construction of a treaty should be given much weight, overlooking that such deci-

sion required that such executive construction be "consistently adhered to by the Executive Department of the Government."

Hereinbefore (*supra*, p. 13), it has been shown that in 1897 the executive construction of an extradition treaty provision similar to Article VI here under consideration, i.e., Article VI of the Treaty with Mexico of 1861, would not permit extradition for "political offenses" even though admixed with "murder, arson, kidnapping and robbery," all crimes clearly specified as extraditable in the Mexican and instant treaties. This executive construction occurred *only four years before* the negotiation in 1901 of the treaty before this Court, and there is no evidence that such executive construction was changed in those four years. In fact it is admitted by petitioners that the construction for which they strive had its inception in 1944 at the earliest (P. 38). Long before that year the United States had concluded with most of the countries of the world extradition treaties which are still in effect, and which were seemingly negotiated upon the construction dating at least from 1897 that "political offenses" despite admixture with crimes of "murder, arson, kidnapping and robbery" were not extraditable. How then can it be successfully urged that "political offenses" admixed with alleged murder, arson, kidnapping, and robbery are now made extraditable because designated as "war crimes" by the demanding government? Particularly this must be untenable when the term "war crimes" was not defined at the time of negotiating such extradition treaties.

However, there is further evidence of which this Court may take notice that the traditional executive

construction of Article VI and similar articles of other extradition treaties has been that "political offenses" are not extraditable, no matter how heinous, unless specifically provided for in the treaty.

In 1881 the regrettable assassination of President James A. Garfield occurred in this city. Thereafter, the United States in negotiating extradition treaties between 1882-1909 with Belgium, Luxemburg, Russia, Denmark, Guatamala, Cuba, Haiti, Portugal, Honduras and Salvador, sponsored the insertion in the "political offenses" article of one of the following or similar provisions:

> "An attempt against the life of the head of a foreign government, or against that of any member of his family when such attempt comprises the act either of murder or assassination, or of poisoning, shall not be considered a political offense or an act connected with such an offense." (Treaty with Belgium, 1882)
>
> "When the offense charged comprises the act either of murder or assassination or of poisoning, either consummated or attempted, the fact that the offence was committed or attempted against the life of the Sovereign or Head of a foreign state or against the life of any member of his family, shall not be deemed sufficient to sustain that such a crime or offence was of political character, or was an act connected with crimes or offences of a political character." (Treaty with Portugal, 1908).

As this exception appeared in no extradition treaties to which the United States was a party prior to 1882, it is apparent that the executive construction of the "political offenses" article was that its non-extraditable character was all-embracing, even to the partic-

ularly abhorrent crime of murder of the President of the United States or a member of his family, and that the proper and correct manner of relieving certain "political offenses" of their non-extraditability was by specific exception in negotiating treaties.

It is interesting to note that during approximately the same period the United States also negotiated extradition treaties with Argentina, Bolivia, Chile, Colombia, Japan, Mexico, Norway, Netherlands, Nicaragua, Panama, Peru, France, Switzerland, Uruguay and Servia (the Yugoslav party to the treaty herein) but was unsuccessful in moving insertion in such treaties of this specific exception to the non-extraditability of "political offenses". While this Court is not in position to determine treaty construction by the foreign parties to the treaties of the United States, it would certainly appear therefrom that these States, many now members of the United Nations, held the view that non-extraditable "political offenses" should not be reduced even to the extent of the specific exception sought by the United States.

Finally, the construction of the "political offenses" article of extradition treaties ascribed to the Executive Department of the Government by petitioners is further shown to be inconsistent and uncertain by the very fact that the Executive Department has not seen fit to reenter this proceeding as amicus curiae in support of the construction ascribed to it. Petitioners try vainly to explain away this lack of support by quoting from the statement of the Executive Department in *Ivancevic* v. *Artukovic*, *supra*, that it would not be concerned with this case. But this is not the first time that the Executive Department has made

this statement. On May 21, 1951, it informed the Yugoslav Government that—

> "it was without authority to act in the matter until it shall have received from the extradition magistrate a transcript of the proceedings in the hearing required by Title 18, U.S.C., Section 3184." (Note of State Department to the Yugoslav Ambassador, R. 82).

Thereafter, the existence of the treaty with Yugoslavia being challenged, the Executive Department entered as amicus curiae. In the present phase of the proceedings, the construction of an article of most of the extradition treaties to which the United States is a party has been raised, and it is at least uncertain whether the construction ascribed to the Executive Department was ever held by it, much less that it has been consistently held or is presently held. Thus the fact that the Executive Department has not again entered as amicus curiae should have consideration in determining whether the construction sought by petitioners was ever held by that Department and whether it has been consistently, or is presently, held.

It is submitted that the sought-for construction of the "political offenses" article of extradition treaties to which the United States is a party is untenable as erected upon circumstances and occurrences not within the operation of such treaties, and furthermore if such a construction was held by the State Department at any time, it was inconsistent with constructions shown to have been previously held, and apparently is not now held.

III.

In Accord With Decisions of This Court Upon the Use of Habeas Corpus, the Court Below Decided the Offenses Charged Were of a "Political Character" Upon Basis of Facts Alleged in the Complaint and Supporting Indictment and Attachment, and Upon Facts of Which Judicial Notice Was Taken. Therefore, No Federal Question Was Decided in Conflict With a Decision or Decisions of This Court.

The record before this Court shows that the decision of the Court below holding that the offenses charged in the extradition complaint were "of a political character", and thus not extraditable, was taken upon an application for a writ of habeas corpus. It is respectfully submitted that the proper questions arising therefrom are whether (1) the Court below had authority to decide whether the offenses so charged were "of a political character", and (2) if so, whether the said Court had before it "legal evidence" upon which it could exercise judgment.

It appears to be undisputed by petitioners that the writ of habeas corpus may properly be used to determine if the examining magistrate or commissioner in extradition proceedings has jurisdiction of the subject-matter and the accused, and if the offenses charged are extraditable under a valid treaty. *Ornelas* v. *Ruiz, supra; Luis Oteiza y Cortes* v. *Jacobus,* 136 U.S. 330, 34 L. ed. 464, 10 S. Ct. 1031. And it may be so used before examination by the said magistrate or commissioner occurs. *Terlinden* v. *Ames,* 184 U.S. 270, 46 L. ed. 534, 22 S. Ct. 484. This latter use is entirely proper since there would be no need for examination if the magistrate or commissioner with whom the complaint is lodged lacks jurisdiction of the subject-matter

or the accused or because there is no treaty or the complaint does not charge an extraditable offense.

As the jurisdiction of the commissioner over the subject matter and the accused has never been disputed, and as the validity of the treaty was settled affirmatively in *Ivancevic* v. *Artukovic, supra,* there remained only for the Court below the determination whether the complaint charges an extraditable offense. The basis for such determination is necessarily limited to the fact allegations found in the complaint as filed, in this case including the foreign indictment and prosecutor's explanation attached thereto, and facts of which judicial notice may properly be taken. As this Court said in *Terlinden* v. *Ames, supra* (p. 279) "On the face of the complaint extraditable offences were charged to have been committed * * *." Equally so, it might be found that offenses charged in the complaint were not extraditable.

Petitioners appear to be urging that the rule of this Court in *Ornelas* v. *Ruiz, supra,* is violated by the decision of the Court below. But, as pertinent to the instant case, the holding of this Court in *Ornelas* v. *Ruiz, supra,* appears to be two-fold, (1) that providing the Commissioner had before him "any legal or competent evidence of facts", he possessed "authority of decision", and (2) that his judgment upon such basis could not be reviewed by another court by use of the writ of habeas corpus.

Accordingly it appears clearly from the decisions of this Court that the Court below had "authority of decision", and the only question remaining is whether the Court below exercised such jurisdiction upon basis of "any legal or competent evidence before it."

As to the determination of what is a "political offense" or one "of a political character," this Court held, also in *Ornelas* v. *Ruiz, supra*, (p. 509), that the commission of an extraditable crime is "a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence * * * cannot be reviewed on the weight of evidence, * * *."

A careful study of the decision of the District Court below, and the affirmation thereof by the Circuit Court below, reveals that both were made upon basis of factual allegations gleaned from the complaint, indictment and attachment and of facts of which judicial notice was taken. Both Courts carefully quoted the factual allegations appearing in the complaint, indictment and attachment, and carefully set forth the facts of which judicial notice was taken (R. 554-5, 560-1), and it appears pointless to restate such findings herein. But petitioners, admitting in the heading of number III of their "Reasons for Granting Writ" (P. 47) that such was the basis of the decision of the Court below, urge in reasoning following such heading that the "The Court below, however, held that *as a matter of law* the murders of men, women and children, etc." were offenses of a political character (P. 48), and conclude, inconsistently with their premise, that "It would thus appear clear that the decision of the Court below, in holding that the alleged crimes are, *as a matter of law*, offenses of a 'political character' etc." conflicts with applicable decision of this Court (P. 56).

It is submitted that the entire reasoning of petitioners under number III of the "Reasons for Grant-

ing the Writ" (P. 47-56) is an attempt to question the judgment of the District Court below, affirmed by the Circuit Court below, made in good faith upon basis of factual allegations in the complaint, indictment, etc., and facts within judicial notice, and to distort such judgment made upon legal evidence as being one made "as a matter of law."

It is therefore further submitted that the rule of *Ornelas* v. *Ruiz, supra,* holding that the judgment of the examining magistrate or commissioner, having jurisdiction and having before him legal evidence, should not be reviewed upon the weight of the evidence, may be properly applied to the judgment of the Court below, it having jurisdiction and having before it legal evidence.

Thus it would appear that the decision of the Court below holding that the offenses of which respondent is accused are, as a matter of fact, of a political character and not extraditable, is not in conflict, but rather is in accord, with decisions of this Court, and the writ ought not to be granted upon such ground.

CONCLUSION

There has been no important question of Federal law presented by this case which has not been long since settled by decision of this Court. The Court below has merely applied the decisions of this Court holding that treaty construction is for the courts, if necessary, to the exclusion of such construction ascribed to the Exective Department of the Government, and also holding that where the language of a treaty provision is unambiguous, the courts have no power to add to or detract from such language.

Nor was the decision of the Court below that the offenses charged were "of a political character" in conflict with a decision or decisions of this Court, but under rules laid down by this Court in several decisions the Court below accepted jurisdiction to make an initial determination of the political character of offenses charged, and made such determination upon basis of competent or legal evidence.

Accordingly it is respectfully submitted that the petition for a writ of certiorari herein be denied.

Respectfully submitted,

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